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NO. 84-1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WINSTON WEN-HSIUNG TSAI

Petitioner

v.

ROBERT CHENG LIANG LI
AND BETTY HSIU FENG LI

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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LIST OF PARTIES

The names of all parties to the proceedings in the District of Columbia Court of Appeals and, as well, in the Superior Court of the District of Columbia, are contained in the caption of the case in this Court.

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COUNTER-STATEMENT OF ISSUES

This is a suit brought by the respondent clients of the attorney petitioner for legal malpractice arising from their loss of certain downpayments which the attorney negligently failed to protect.

Had the attorney petitioner protected these downpayments, the subsequent bankruptcy of the contractor could not have had any effect upon them. Instead, as there was no protection, when the contractor filed for bankruptcy the respondents' downpayments were irretrievably lost. After trial, the jury returned a verdict in favor of the respondent clients, which verdict was in all particulars affirmed by the District of Columbia Court of Appeals. Tsai v. Li, Nos. 82-1079 and 82-1080, Memorandum Opinion at 1, n.1 (D.C. Feb. 13, 1985), [hereinafter cited as Mem. Op.]; which appears in Appendix to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals at 4, n.1 [hereinafter cited as App.].

In this court, the petitioner cloaks each of the issues he presents in

the cloth of due process, although he failed to do so in any lower court. In fact, petitioner's first issue was not even briefed for the consideration of the District of Columbia Court of Appeals. In his second issue the petitioner attorney erroneously relies upon the due process clause of the Fourteenth Amendment, instead of the like clause of the Fifth Amendment which properly applies to the District of Columbia. See Bolling v. Sharpe, 347 U.S. 497 (1954). In the third issue that he asks this court to consider as reason to issue a writ of certiorari, the petitioner attorney phrases the issue in terms of the action of the District of Columbia Court of Appeals in an effort to bootstrap a due process consideration from an issue of what constitutes proximate cause. With

this background, in the context of the facts of this case, the issues should be phrased as follows:

1. Did the complaint of the respondent clients provide to the petitioner attorney legally sufficient notice of a claim that the downpayments should have been protected?

2. May an attorney expert witness, who is admitted to practice law in the same jurisdiction as is the defendant attorney, testify as to the standard of care required where the events subject to the litigation transpired in a neighboring jurisdiction where neither were members of the Bar?

3. Is the "substantial factor" criterion a proper statement of proximate cause, where more than one cause resulted in the same damage?

COUNTER-STATEMENT OF THE CASE

The statement of the case provided to this court by the petitioner is replete with misleading statements, error and irrelevant materials. Simply put, in this action of legal malpractice, the respondent clients claimed, in their first count, that the petitioner attorney was negligent in tendering to the contractor certain downpayments without first

> securing a binding and enforceable agreement, determining that ... [the contractor] had obtained financing, obtaining a financial statement from ... [the contractor], requiring ... [the contractor] to obtain a performance bond, depositing the money in escrow, or providing such 'ordinary, customary and necessary safeguards as are usually required of attorneys of ordinary prudence in representing clients in the same or similar circumstances.'

Mem. Op. at 3, n.5; App. at 9, n.5. It was this count which went to the jury on the issue of the necessity of segregating

that portion of the downpayment which related to equipment purchase. With the exception of contradictory statements by the petitioner as to his asking for financial statements from the contractor,[1/] and whether the letter dated July 19, 1975, constituted a formal sales agreement, there were no factual disputes on whether the petitioner did the specific things alleged before turning over the downpayment: He did not do them.

Contrary to the implication of the statements of the petitioner, at the time of the events from which this litigation arose, the petitioner attorney was only licensed to practice law in the District of Columbia. See Petition for a Writ of Certiorari to the District of Columbia Court of Appeals at 4, Tsai v. Li, No. 84-1983, October Term [hereinafter cited

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1/ The credibility of the petitioner was an issue at trial, where he was impeached.

as Petition]; cf. Mem. Op. at 5, n.7; App. at 14, n.7. Ironically, the petitioner continues boldly to proclaim that he represented the respondents in the State of Maryland, in this restaurant transaction, even though for any unlicensed attorney to take a fee for any type of legal service rendered in the State of Maryland without being a licensed Maryland attorney constitutes a misdemeanor. Md. Ann. Code, art. 10, § 32; and see Md. Ann. Code, art. 10, § 1; and 61 Op. Md. Att'y. Gen. 43 (1977). The petitioner admits incorporating the respondents, he admits negotiating a lease for the rental of space for the restaurant, he admits negotiating a construction/equipment agreement, all in the State of Maryland. Mem. Op. at 2-3; Petition at 5-7. In attempting to foist responsibility

upon the respondents for his negligent acts, the petitioner continues to assert that the respondents negotiated directly with the contractor and that an amended agreement resulted. Petition at 6-7. Both of these assertions were contradicted by the respondents; Mrs. Li denied that she ever negotiated directly with the contractor during the period at issue (Trial Transcript at 167) [hereinafter cited as Tr.], and the petitioner -- himself -- wrote to the contractor two months after the supposed "purchase agreement" of "July 19, 1975" (Petition, at 6) had been signed, requesting that the contractor "[p]repare a formal sales contract...." Mem. Op. at 3; App. at 8.

Finally, the trial court ruled that all of the financial dealings of the respondent clients following the bankruptcy of the contractor were

irrelevant to the issues presented by the litigation. Tr. at 185-187. The petitioner's reportage of events following the contractor's bankruptcy (Petition at 7-8) not only bears that stamp, but is in error -- when the restaurant was sold it was sold at a loss to the respondents, a loss not including the money lost by the negligence of the petitioner.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The first question presented by the petitioner attorney involves an issue which was not briefed by the parties before the District of Columbia Court of Appeals. The issue was not presented to the trial court, either at trial or thereafter. In essence the petitioner here asks this court to issue a writ of certiorari as he had no notice of a claim that certain monies should have

been protected. The petitioner claims that he

> had no fair opportunity to defend and offer expert testimony to rebut the newly added theory of the standard of care for any attorney to segregate the portion of the downpayment for equipment. This theory was never brought up in the complaint or pretrial statement. It was raised by the lower court only at the time of the trial for the jury after the denial of directed verdict. Petitioner not only was not given a proper notice of the claim but was also not given a reasonable time and opportunity to present the defense.

Petition at 20-21. In their complaint the respondent clients alleged legal malpractice. That claim was never changed. In their complaint the respondent clients alleged that the downpayments should have been placed in escrow, and that failing to do so breached the standard of care for a lawyer. That allegation was tried. The respondent clients offered an

expert witness to establish this standard. In fact, this was a "Civil 1" case, which was assigned under the system of the Superior Court of the District of Columbia to a given judge, supposedly from complaint to appeal; here three judges were, in seriatim, assigned to the case. Two of these, Judges Thompson and Pratt, long before trial and in the presence of the petitioner, told the plaintiffs that they would not allow the case to go to the jury without expert testimony. Yet, the petitioner never asked an interrogatory regarding expert witnesses, and even after the pretrial statement of the plaintiffs identified their expert, no request to depose him was made by the petitioner. Further, at trial, the petitioner did not offer any expert testimony. Mem. Op. at 5, n. 8; App. at 16, n. 8.

Now the petitioner wants to present an expert. In the instant petition is the first time he has suggested that he might even need one. Had the petitioner taken the time to frame interrogatories or depose the expert of the respondents, he would have ascertained the testimony of the expert before trial. At trial, the petitioner did not express surprise at the testimony of the expert, nor should he have: Malpractice was alleged and the standard, it was alleged, required placing the entire downpayment in escrow -- segregating it. The expert testified that only part of the downpayment should have been segregated, not all of it as was alleged.

The petitioner does not claim, nor can he, that he did no know that the contract was for both construction and equipment. Likewise, as he negotiated

the contract, he cannot claim he did not know the downpayment included monies for both construction and equipment. In fact at trial the petitioner stipulated to the amount of the downpayment which should have been applied towards the purchase of the equipment. There was proper notice of the claim against him. There was no surprise. The petitioner announced ready for trial and, therefore, he was prepared to try the whole of the downpayment being required to be segregated without an expert testifying in his defense; the whole included both construction and equipment monies. The lesser was included in the greater. The petitioner had notice.

Further, in their complaint the respondents alleged that the petitioner had failed to provide them such "ordinary, customary and necessary safeguards as are

usually required of attorneys of ordinary prudence in representing clients in the same similar circumstances." Mem. Op. at 3, n. 5; App. at 9, n.5. Petitioner never requested further specification of this allegation. Thus, petitioner's complaint to this court comes too late and solely as a result of his own failures, both to make timely use of the discovery procedures available to him and to timely claim surprise at trial having failed to take proper discovery. There has been no due process violation. Quoting Professor Clark with approval in Kuhn v. Civil Aeronautic Board, 183 F.2d 839, 841, n. 3 (D.C. Cir. 1950), cited by the petitioner, the court underscores the problem here: "If ...[the defendant's] case is prepared adequately he will not be surprised. Our solicitude for him will simply result in giving him opportunities to delay the case

and harass his opponent." Clark, Code Pleading 30 (1928). This was not a trial by ambush. The petitioner had both notice of the claim and the means to find out more. See Jimenez v. Tuna Vessel "Granada," 652 F.2d 415, 420 (5th Cir. 1981).

The second issue presented by the petitioner relates to the qualifications of the expert witness who established the standard of care. It is well settled in the District of Columbia that the qualifications of an expert witness to express his cr her opinions on particular matters are for the determination of the trial judge, and that the trial judge's decision "will ordinarily not be disturbed on appeal except for a clear showing of abuse of discretion." Waggaman v. Forstmann, 217 A.2d 310, 311 (D.C. 1966). Thus, the first issue is whether the trial abused

its discretion in qualifying Stephen H. Friedlander, Esquire, as the expert witness to establish the standard of care.[2/]

A proper voir dire of Mr. Friedlander was conducted at trial. Tr. at 248-253. The voir dire showed that Mr. Friedlander had been practicing law in the District of Columbia for nineteen years; that he had been graduated from Washington-Lee University and Georgetown University Law School; that he was a member of the American Bar Association, the D.C. Bar Association and Phi Delta Phi; that he had been in private practice for the entire nineteen years he practiced law; that his practice

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2/ No expert testimony was offered by Mr. Tsai in contradiction to that of Mr. Friedlander. Mr. Tsai did testify as to his opinion without being qualified; Mr. Rosenfield, who is not a lawyer. did testify as to his equipment firm's practices. See Mem. Op. at 5; App. at 15-16.

consisted of commercial law, "real estate, construction, restaurants, representing developers, landlords, tenants and restauranteurs." Tr. at 249-250. Mr. Friedlander testified that he was familiar with the standard of care for an attorney in representing either a contractor or a tenant restauranteur "both in the District of Columbia and ... Maryland." Tr. at 250.

Mr. Friedlander also admitted he was not licensed to practice law in the State of Maryland. Tr. at 252. As Mr. Tsai was only admitted to practice law in the District of Columbia at the time of the events of which complaint was made, the proper standard by which he is to be judged is the standard for the District of Columbia, and not as he posits, the standard for Maryland. As the District of Columbia Court of Appeals put it, the

petitioner "is scarcely in a position to raise this claim [that only a Maryland attorney could establish the standard] in light of the fact that he was not a member of the Maryland Bar during the time priod at issue in this case" Mem. Op. at 4-5, n.7; App. at 14, n.7. Following argument upon the voir dire, the trial court allowed Mr. Friedlander to testify as an expert. Tr. at 255, et seq.; and see Mem. Op. at 4; App. at 13-16.

The District of Columbia Court of Appeals (App. at 14) correctly relied in the case of Fraser v. Crounse, 56 A.2d 54 (D.C. 1947) to conclude no abuse of discretion is manifest. In that case an objection was made that a District of Columbia lawyer was not qualified to testify regarding legal fees charged within the Commonwealth of Virginia,

because he was not a member of the Bar of the Commonwealth and the services were rendered in that State. In reversing the lower court's determination that the proffered expert could not testify, the court there said:

> By the great weight of authority a lawyer of one jurisdiction is qualified to testify as an expert with respect to legal services rendered in a neighboring jurisdiction. That he is not a member of the Bar of the other jurisdiction, has had a limited experience there and has only slight knowledge of the fees customarily charged there, does not render him incompetent as a witness but goes only to the weight of his testimony. It was error not to allow the witness to testify. [Id. at 56.]

This is the law of the District of Columbia. As the District of Columbia Court of Appeals properly held, the trial court properly exercised its discretion in allowing Mr. Friedlander to testify. There is no due process issue for this court to consider.

The third issue presented by the petition is that of causation: The petitioner argues that his conduct could not have been the proximate cause of the injury suffered by the respondents, that the proximate cause was the bankruptcy of the construction company. In presenting his argument upon causation to the District of Columbia Court of Appeals, the petitioner adopted the "more favorable result" yardstick. Assuming arguendo that this is the criterion, there can be no doubt that had the petitioner abided by the standard of care established by the expert, and segregated the monies for equipment purchases, that the respondents would have had no claim against him, as a more favorable result would have obtained. This conclusion is reached because instead of losing their money, the

money would have gone directly for the purchase of the equipment.

A more lucid analysis of the relationship between the acts and omissions of the petitioner and the respondents' loss of their money is set forth by John Sherman Myers, in Causation and Common Sense, 5 Miami L.Q. 238 (1951):

> Contrasted with cases involving direct causation are those factual situations regarded as indirect causation, -- where the defendant's act is a substantial factor in bringing about the result of which the plaintiff complains, and where the other elements essential to his case appear, but where the force set in motion by the defendant does not itself come into direct contact with the plaintiff or his property, and does not directly create, or set in motion, a force which does. Nevertheless, although spent itself, the defendant's wrong creates a situation from which there is increased danger of injury of some kind. Acting on the stage thus wrongfully set by the defendant, a new and independent force intervenes, and it is the new force

> that is the direct cause of the result [of which respondents complained], made possible only by the previously active, but now spent force of the defendant.

Myers, Causation and Common Sense, 5 Miami L.Q. 238, 248 (1951) (emphasis added). The "substantial factor" criterion has been adopted by the District of Columbia as a part of proximate cause instructions. Lacy v. District of Columbia, 424 A.2d 317 (D.C. 1980).

In this case, by failing to segregate the funds for equipment purchase, inter alia, the petitioner set the stage. By violating the standard of care in the community, the petitioner created a situation of increased danger of injury to the respondents. His failure to act placed them in a vulnerable and exposed position. The bankruptcy of the contractor did the rest. Causation in law,

and in fact, exists, as the petitioner's placement of the respondents in a more vulnerable position was a substantial factor in their loss of their money. As the District of Columbia Court of Appeals noted, that the bankruptcy of the contractor "was also a cause of the loss of downpayment does not negate the fact that ...[petitioner's] negligence caused the ...[respondents'] injury." Mem. Op. at 6; App. at 19.

CONCLUSION

The petition offers no compelling reason for this court to grant a writ of certiorari directed to the District of Columbia Court of Appeals. There are no issues of national importance involved in this case. There are no splits in decisions between circuits in need of resolution. In fact, there is not even a significant federal question involved.

As shown above, the due process issues presented by the petitioner are bogus; the issues presented by the petitioner are mundane issues of law unique to the District of Columbia. For the foregoing reasons the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals was hand-delivered to Winston Wen-Hsiung Tsai, Esquire, 1612 K Street, N.W., Suite 702, Washington, D.C. 20006, this 22nd day of July, 1985.

Glenn H. Carlson, Esquire